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6 UNITED STATES OF AMERICA
7 Department of Commerce
8 National Oceanic and Atmospheric Administration

9 *In re:* Proposed Waiver and Regulations
10 Governing the Taking of Eastern North
11 Pacific Gray Whales by the Makah Indian
Tribe

Hon. George J. Jordan
Hearing Docket No. 19-NMFS-0001

12
13 **SEA SHEPHERD’S REQUEST
TO MOVE THE HEARING DATE**

14 On May 10, 2019, Sea Shepherd Legal (SSL) and Sea Shepherd Conservation Society
15 (SSCS) (collectively “Sea Shepherd”) moved for an extension of the deadline to submit initial direct
16 testimony and all deadlines thereafter by a minimum of 90 days. Dkt. No. 17-19. On May 20, 2019,
17 the presiding officer, Administrative Law Judge (ALJ) Jordan (Judge Jordan) denied Sea Shepherd’s
18 motion. Dkt. No. 32. While ruling that he possessed the authority to modify the schedule, Judge
19 Jordan found that the circumstances at the time did not warrant the relief requested. In light of
20 changed circumstances, and at the request of Judge Jordan at the pre-hearing conference, Sea
21 Shepherd renews its request for a continuance of the hearing – albeit for a much shorter extension.
22 Specifically, Sea Shepherd requests that the hearing be moved from the week of August 12, 2019 to
23 the week of **September 16, 2019**. Based upon discussions at the pre-conference hearing, Sea
24 Shepherd understands that the majority of the parties in attendance at the conference are agreeable
25 this extension

1 **ARGUMENT**

2 **I. The ALJ Has the Full Authority and Discretion To Grant the Requested Relief**

3 In ruling on Sea Shepherd’s May 10th motion, Judge Jordan acknowledged that he has the
4 legal authority to alter dates associated with the present hearing. This aspect of the ruling is in
5 accord with the Administrative Procedure Act (APA) and governing case-law, which clearly
6 recognize an ALJ’s power to alter deadlines to ensure a fair proceeding. *See, e.g.*, 5 U.S.C. §
7 556(c)(2), (9) (authorizing ALJs to “regulate the course of the hearing” and to “dispose of procedural
8 requests or similar matters”); *Professional Air Traffic Controllers Organization v. Federal Labor*
9 *Relations Authority*, 685 F.2d 547, 588 (D.C. Cir. 1982) (*accord*). Moreover, as Judge Jordan
10 observed, section 228.6(b)(1) of the governing regulations explicitly states that the presiding officer
11 has the power to “[c]hange the time and place of the hearing[.]” 50 C.F.R. § 228.6(b)(1). In short,
12 there is no question that the presiding officer has the legal authority to grant the relief requested in
13 the present motion (*i.e.*, to postpone the hearing until the week of September 16, 2019).

14 **II. An Extension Is Necessary to Sea Shepherd’s Effective Presentation of its Case**

15 In his May 20th order, Judge Jordan held that his authority to modify the default timelines
16 governing the submission of testimony (established in 50 C.F.R. § 228.7(a)) is dependent upon a
17 showing of a lack of prejudice to any Party. This ruling was predicated upon the language of section
18 228.6(b)(5) – providing that the presiding officer may “[m]odify or waive any rule (after notice)
19 when determining that no party will be prejudiced.” 50 C.F.R. § 228.6(b)(5).

20 Although Sea Shepherd respectfully disagrees that this “no prejudice” standard governs a
21 decision to modify the default timeline for submission of initial direct testimony, it is clear that this
22 standard does *not* apply to requests to modify the hearing date. Unlike section 228.7(a), the
23 provision governing the timing of the hearing, 50 C.F.R. § 228.4, does *not* require the hearing to
24 occur by a date certain. Rather, section 228.4 merely provides that the hearing “shall not be less
25 than 60 days after publication of notice of the hearing.” 50 C.F.R. § 228.4(b)(2). Thus, the “no

1 prejudice” standard set forth in 228.6(b)(5) does not apply to a request to postpone the hearing
2 *because the regulations do not require a hearing to take place within any specific timeframe.* The
3 only mandatory language, which is not at issue here, is the requirement that the hearing take place no
4 sooner than 60 days following publication of the notice.¹

5 Given that the “no prejudice” standard is not applicable, Sea Shepherd’s request to postpone
6 the hearing is governed, at most, by a “good cause” standard. As Judge Jordan observed, “a ‘good
7 cause’ standard is generally appropriate in administrative proceedings[.]” Dkt. No. 32 at 4.
8 Nevertheless, where, as here, the majority of the parties have generally agreed to an extension of the
9 hearing date, it should be unnecessary for the presiding officer to apply a “good cause” standard in
10 rendering a decision on the extension request. Rather, in addition to accounting for the general
11 consensus on an extension, the presiding officer should also be guided by the APA requirement that
12 a party be “entitled to present his case . . . as may be required for a full and true disclosure of the
13 facts.” 5 U.S.C. § 556(d). As detailed below, the reasonable extension requested by Sea Shepherd is
14 critical to its ability to effectively present its case against the proposed waiver.

15 **III. Changed Circumstances Justify the Requested Relief**

16 Following Judge Jordan’s May 20th ruling, certain circumstances have changed. These new
17 circumstances, combined with Sea Shepherd’s more limited request, clearly support postponement
18 of the hearing until the week of September 16, 2019.

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22 ¹ This conclusion is reinforced by the fact that section 228.6(b)(1) explicitly authorizes the
23 presiding officer to “[c]hange the time and place of the hearing” *without any additional qualifying*
24 *language.* 50 C.F.R. § 228.6(b)(1).

1 **A. Sea Shepherd’s Planned Attendance at a Significant International Conference Will**
2 **Substantially Impair Its Effective Participation in the Hearing**

3 On April 21, 2019, several explosions erupted in Sri Lanka. Pruettt Decl. at ¶ 17. These
4 terrorist attacks claimed the lives of over 250 individuals. *Id.* While the human toll was horrendous,
5 the attacks also complicated the work of the Parties to the Convention on International Trade in
6 Endangered Species of Fauna and Flora (CITES). The Conference of the Parties (CoP), a meeting
7 held every three years, was scheduled to be held in Sri Lanka from May 23 to June 3, 2019. Pruettt
8 Decl. at ¶¶ 14&15. Given the uncertainty surrounding the security situation in Sri Lanka, the CITES
9 Secretariat postponed the CoP on April 26th pending further analysis. *Id.* at ¶ 17. In the meantime,
10 the CITES Parties and official observer organizations (including SSL, which participated in the
11 previous 2016 CoP in South Africa) had no way of knowing when or where the CoP would occur.
12 *Id.* Finally, on June 12th, the Secretariat announced that the CoP was rescheduled to take place from
13 August 17th through August 28th in Geneva, Switzerland. *Id.* at ¶ 18.

14 SSL is a small organization, with three full-time staff members. To effectively participate in
15 the complex proceedings of the CoP, SSL would need to send at least two of its three staff to
16 Geneva. *Id.* at ¶ 19. Of note, all three full-time SSL staff members attended the 2016 CoP in South
17 Africa. *Id.* at ¶ 8. Yet, even with this level of attendance, it was challenging to engage in all
18 relevant aspects of the proceedings. *Id.* at ¶ 19. In this regard, the suggestion by counsel for the
19 Makah Tribe at the pre-hearing conference that SSL could simply miss the first portion of the CoP is
20 misguided and uninformed. Extensive preparation is required for effective and meaningful
21 attendance at a CITES CoP, including the review and analysis of a large number of conference
22 documents (*i.e.* resolutions and species proposals). *Id.* at ¶ 6. Additionally, in 2016, SSL conducted
23 a so-called “side event” at the CoP involving creation of a short film and presentations by a panel of
24 experts. *Id.* at 12. Such side events – which are geared toward convincing State-sponsored
25 delegates to vote in favor of greater species protections in the CoP – involve extremely time-

1 consuming preparations. *Id.* SSL intends to be involved in a side event at this year’s CoP. *Id.* at ¶
2 13.

3 Assuming the administrative hearing in this matter runs from August 12 to August 16, SSL
4 would not be able to effectively participate in the CITES CoP. *Id.* at ¶¶ 19-21. In addition to
5 attending the CoP itself, staff from SSL need to travel to Switzerland several days ahead of time
6 (during the scheduled hearing in this matter) to attend the CITES Standing Committee meeting
7 (which immediately precedes the plenary session of the CoP) and participate in preparatory meetings
8 with other conservation organizations. *Id.* at ¶ 10. Of critical importance is the series of pre-CoP
9 meetings held by the Species Survival Network (SSN). *Id.* Founded in 1992, SSN is an
10 international coalition of non-governmental organizations (NGOs) committed to the promotion,
11 enhancement, and strict enforcement of CITES. Pruettt Decl. at ¶ 11. SSL is a member of SSN.
12 Pruettt Decl. at ¶ 10. The SSN meetings are critical to ensuring that NGO observers coordinate a
13 unified approach to issues of common concern. *Id.* at ¶ 11. Without such a coordinated approach,
14 the effectiveness of NGO participation is substantially undercut, as conservation groups are vastly
15 outnumbered by nation States and organizations that advocate for diminished wildlife protections in
16 the complicated CoP decision-making process. *Id.*

17 In light of the recently announced rescheduled CITES CoP dates, the timing of the currently
18 scheduled hearing could not be worse. As it stands, SSL will be forced to choose between
19 participation in this formal rulemaking or participation in the CITES CoP. *Id.* at ¶ 21. Effectively
20 achieving both objectives is not possible. *Id.* This dilemma can be avoided entirely by granting Sea
21 Shepherd’s requested reasonable, one-month extension of the hearing to September 16, 2019.

22 **B. Sea Shepherd’s Witnesses May Not Be Able To Participate in the Hearing Under**
23 **the Current Schedule**

24 Even if SSL abandoned its plans to attend the CITES CoP, a major setback for a small
25 organization that has designed a significant portion of its work around this event since attending the

1 last CoP in 2016, Sea Shepherd’s ability to participate in the hearing as scheduled may be
2 substantially compromised due to witness scheduling conflicts. This circumstance further supports
3 postponing the hearing to the week of September 16, 2019.

4 Over the past several weeks, SSL has been in contact with two out-of-state gray whale
5 experts. Both experts have expressed an interest in (1) serving as rebuttal witnesses concerning
6 certain assertions advanced by the direct testimony offered in this matter to date and (2) submitting
7 potential direct testimony concerning the Unusual Mortality Event identified as a new issue during
8 the pre-hearing conference. Pruet Decl. at ¶ 23. However, despite their desire to participate in this
9 matter, both experts have stated that it would be an extreme hardship for them to prepare for, travel
10 to, and participate in the hearing as scheduled. *Id.* In particular, Sea Shepherd’s experts have
11 significant professional and personal scheduling conflicts during the week of August 12th. *Id.* By
12 comparison, both experts have indicated that, at this point, their schedules are more flexible if the
13 hearing were postponed until the week of September 16. *Id.*

14 Sea Shepherd has worked diligently to secure appropriate witnesses in this case.
15 Unfortunately, given the small community of experts qualified to speak on the specific issues in this
16 matter, it would not be a realistic possibility for Sea Shepherd to find adequate substitute witnesses –
17 especially in the short time period established for this proceeding. In light of the modest
18 continuance sought by Sea Shepherd, the significant evidentiary benefits that would flow from the
19 presence of these rebuttal (and, potentially, direct) witnesses, and the general agreement of most of
20 the parties to a reasonable extension, the requested relief should be granted.

21 **CONCLUSION**

22 For the foregoing reasons, Sea Shepherd respectfully requests that Judge Jordan grant its
23 reasonable request to postpone the hearing until September 16, 2019.

1 Dated this ___th day of June 2019

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16 Attorneys for SEA SHEPHERD LEGAL and
17 SEA SHEPHERD CONSERVATION SOCIETY

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I have served the foregoing Renewed Motion for Continuance of Hearing upon
3 the following Parties to this proceeding at the addresses indicated below via electronic mail:

4 NMFS Mr. Barry Thom 5 Regional Administrator 6 NMFS, West Coast Region 7 1201 NE Lloyd Boulevard, Suite 1100 Portland, OR 97232 Barry.thom@noaa.gov	NMFS Laurie K. Beale Attorney-Advisor, Northwest Section NOAA Office of General Counsel NW 7600 Sand Point Way NE Seattle, WA 98115 laurie.beale@noaa.gov
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19 On the same date, I served the foregoing document to the following party first class mail to:

20 **Inanna McCarthy**
21 P.O. Box 792
22 Neah Bay, WA 98357

1 Dated this ___th day of June 2019.

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